

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

MONIQUE BORK,

Case No.: 2:16-cv-01235-APG-VCF

Petitioner

Order

V.

DWIGHT NEVEN, et al.,

Respondents.

9 Monique Bork, a Nevada prisoner, filed a petition for writ of habeas corpus under 28
10 U.S.C. § 2254. I deny Bork's habeas petition, deny her a certificate of appealability, and direct
11 the Clerk of the Court to enter judgment accordingly.

I. BACKGROUND

Bork's convictions are the result of events that occurred in Clark County, Nevada on or about August 20, 2006. ECF No. 18-6 at 2. Bork left her two-month old son, the victim in this case, in the care of her then boyfriend, Edward Thompson, Jr., who was under the influence of methamphetamine. ECF No. 18-7 at 8-9. Thompson shook the victim causing irreversible injuries. *Id.* Bork later admitted to not seeking immediate medical attention for the victim and to helping Thompson cover up the abuse. *Id.* Due to the shaking, the victim was legally blind, had Cerebral Palsy, required nutrition through a Gastrostomy Tube, and suffered from numerous other medical problems. ECF No. 23 at 7. The victim died as a result of his injuries in 2011. *Id.*

21 Bork was charged with murder and child abuse/neglect resulting in the substantial bodily
22 harm of her son. ECF No. 18-6 at 2-3. Bork pleaded guilty to child abuse/neglect resulting in
23 substantial bodily harm in return for the murder charge being dismissed and for her testimony

1 against Thompson. ECF No. 18-7 at 3-4, 8; ECF No. 18-8. Bork was sentenced to 96 to 240
2 months in the Nevada Department of Corrections. ECF No. 20-3 at 3. Bork appealed, and the
3 Nevada Supreme Court affirmed the judgment of conviction on January 22, 2015. ECF No. 20-
4 14. Remittitur issued on February 17, 2015. ECF No. 20-15.

5 Bork filed a state habeas corpus petition on May 5, 2015. ECF No. 20-17. The state
6 district court denied the petition on September 1, 2015. ECF No. 21-2. Bork appealed, and the
7 Nevada Court of Appeals affirmed on February 17, 2016. ECF No. 21-11. Remittitur issued on
8 March 14, 2016. ECF No. 21-12.

9 Bork dispatched her federal habeas corpus petition on or about May 23, 2016. ECF No.
10 1-1. On February 28, 2017, Bork filed a counseled amended petition. ECF No. 17. The
11 respondents moved to dismiss the petition on May 26, 2017. ECF No. 27. I granted the motion
12 in part and denied the motion in part. ECF No. 43 at 6. Specifically, I dismissed Ground One,
13 Part Three with prejudice as procedurally defaulted to the extent that Bork alleged that her plea
14 was not voluntary, knowing, and intelligent due to prosecutorial misconduct; deferred
15 consideration of whether Bork can demonstrate cause and prejudice under *Martinez v. Ryan*, 566
16 U.S. 1 (2012), to overcome the procedural default of the remainder of Ground One, Part Three;
17 and dismissed Ground Two, Part Two with prejudice as procedurally defaulted and abandoned.
18 *Id.* The respondents answered the remaining grounds in Bork's petition on May 8, 2018. ECF
19 No. 50. Bork replied on September 24, 2018. ECF No. 55.

20 In Bork's remaining grounds for relief, she alleges the following violations of her federal
21 constitutional rights:

- 22 1. She entered a plea that was not voluntary, knowing, or intelligent:
23 1.1 She was coerced to plea by her trial counsel and prosecutors.
1.2 She did not understand the elements of the offense.

- 1.3 The ineffective assistance of her trial counsel made her plea unconstitutional.
 2. The prosecution engaged in prosecutorial misconduct by coercing her into pleading.
 3. She was denied the effective assistance of counsel:
 - 3.1 Her trial counsel failed to conduct necessary pre-trial litigation by failing to conduct a full preliminary hearing and failing to move to dismiss the child abuse charges based on a statute of limitations defense.
 - 3.2 Her trial counsel failed to investigate.
 - 3.3 Her trial counsel coerced her into pleading.
 - 3.4 Her trial counsel failed to object at sentencing.
 4. The state district court erred in allowing a non-victim to speak in the voice of the deceased child.
 5. Her sentence was cruel and unusual.
 6. The state district court judge highlighted the sentence she imposed on Bork on her Facebook page in support of her re-election.
 7. There were cumulative errors.

ECF No. 17.

II. STANDARD OF REVIEW

The standard of review generally applicable in habeas corpus cases under the Antiterrorism and Effective Death Penalty Act (“AEDPA”) is as follows:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
 - (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). A state court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28 U.S.C. § 2254, “if the state court applies a rule that contradicts the governing law set forth in [the Supreme Court’s] cases” or “if the state court

1 confronts a set of facts that are materially indistinguishable from a decision of [the Supreme]
2 Court.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003) (quoting *Williams v. Taylor*, 529 U.S. 362,
3 405-06 (2000), and citing *Bell v. Cone*, 535 U.S. 685, 694 (2002)). A state court decision is an
4 unreasonable application of clearly established Supreme Court precedent within the meaning of
5 28 U.S.C. § 2254(d) “if the state court identifies the correct governing legal principle from [the
6 Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s
7 case.” *Id.* at 75 (quoting *Williams*, 529 U.S. at 413). “The ‘unreasonable application’ clause
8 requires the state court decision to be more than incorrect or erroneous. The state court’s
9 application of clearly established law must be objectively unreasonable.” *Id.* (quoting *Williams*,
10 529 U.S. at 409-10) (internal citation omitted).

11 “A state court’s determination that a claim lacks merit precludes federal habeas relief so
12 long as ‘fairminded jurists could disagree’ on the correctness of the state court’s decision.”
13 *Harrington v. Richter*, 562 U.S. 86, 101 (2011) (citing *Yarborough v. Alvarado*, 541 U.S. 652,
14 664 (2004)). The Supreme Court has stated “that even a strong case for relief does not mean the
15 state court’s contrary conclusion was unreasonable.” *Id.* at 102 (citing *Lockyer*, 538 U.S. at 75);
16 *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (describing the standard as a “difficult to
17 meet” and “highly deferential standard for evaluating state-court rulings, which demands that
18 state-court decisions be given the benefit of the doubt” (internal quotation marks and citations
19 omitted)).

20 **III. DISCUSSION**

21 **A. Ground One**

22 In Ground One, which includes three subparts, Bork asserts that her federal constitutional
23 rights were violated because her plea was not voluntary, knowing, or intelligent. ECF No. 17 at

1 30. The federal constitutional guarantee of due process of law requires that a guilty plea be
2 knowing, intelligent, and voluntary. *See Brady v. United States*, 397 U.S. 742, 748 (1970);
3 *Boykin v. Alabama*, 395 U.S. 238, 242 (1969); *United States v. Delgado-Ramos*, 635 F.3d 1237,
4 1239 (9th Cir. 2011). “The voluntariness of [a petitioner’s] plea can be determined only by
5 considering all of the relevant circumstances surrounding it.” *Brady*, 397 U.S. at 749.

6 Addressing the “standard as to the voluntariness of guilty pleas,” the Supreme Court has stated:

7 (A) plea of guilty entered by one fully aware of the direct consequences, including
8 the actual value of any commitments made to him by the court, prosecutor, or his
9 own counsel, must stand unless induced by threats (or promises to discontinue
improper harassment), misrepresentation (including unfulfilled or unfulfillable
promises), or perhaps by promises that are by their nature improper as having no
proper relationship to the prosecutor’s business (e.g. bribes).

10
11 *Brady*, 397 U.S. at 755 (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957),
12 *rev’d on other grounds*, 356 U.S. 26 (1958)); *see also North Carolina v. Alford*, 400 U.S. 25, 31
13 (1970) (noting that the longstanding “test for determining the validity of guilty pleas” is
14 “whether the plea represents a voluntary and intelligent choice among the alternative courses of
15 action open to the defendant”); *United States v. Doe*, 155 F.3d 1070, 1074 (9th Cir. 1998) (“A
16 waiver is voluntary if, under the totality of the circumstances, [it] was the product of a free and
17 deliberate choice rather than coercion or improper inducement.”). Although a plea may not be
18 produced “by mental coercion overbearing the will of the defendant,” a guilty plea made
19 following “the post-indictment accumulation of evidence [that] convince[s] the defendant and his
20 counsel that a trial is not worth the agony and expense to the defendant and his family” is not
21 “improperly compelled.” *Brady*, 397 U.S. at 750 (reasoning that “mental coercion” is only found
22 if the defendant “did not or could not, with the help of counsel, rationally weigh the advantages
23 of going to trial against the advantages of pleading guilty”). Accordingly, a guilty plea is not

1 rendered invalid when it has been “motivated by the defendant’s desire to accept the certainty or
2 probability of a lesser penalty rather than face a wider range of possibilities extending from
3 acquittal to conviction and a higher penalty authorized by law for the crime charged.” *Id.* at 750.

4 In *Blackledge v. Allison*, the Supreme Court addressed the evidentiary weight of the
5 record of a plea proceeding when the plea is subsequently subject to a collateral challenge. 431
6 U.S. 63 (1977). While noting that “the barrier of the plea . . . proceeding record . . . is not
7 invariably insurmountable” when challenging the voluntariness of his plea, the Court stated that,
8 nonetheless, the defendant’s representations, “as well as any findings made by the judge
9 accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings” and
10 that “[s]olemn declarations in open court carry a strong presumption of verity.” *Id.* at 74; *see also*
11 *Muth v. Fondren*, 676 F.3d 815, 821 (9th Cir. 2012) (“Petitioner’s statements at the plea colloquy
12 carry a strong presumption of truth.”); *Little v. Crawford*, 449 F.3d 1075, 1081 (9th Cir. 2006).

13 In Bork’s appeal of the denial of her state habeas petition, the Nevada Court of Appeals
14 held:

15 In her petition filed May 5, 2015, appellant Monique Bork claimed her guilty plea
16 was not entered knowingly, intelligently, or voluntarily because the district court
failed to properly canvass her on the elements of the crime and her appellate rights
and because her plea was coerced.

17 “To correct manifest injustice, the court after sentence may set aside the judgment
18 of conviction and permit the defendant to withdraw the plea.” NRS 176.165. “A
manifest injustice occurs where a defendant makes a plea involuntarily or without
knowledge of the consequences of the plea—or where the plea is entered without
knowledge of the charge or that the sentence actually imposed could be imposed.”
State v. James, 500 N.W.2d 345, 348 (Wis. Ct. App. 1993) (internal quotation
marks omitted). “[We] will not overturn the district court’s determination on
manifest injustice absent a clear showing of an abuse of discretion.” *Rubio v. State*,
124 Nev. 1032, 1039, 194 P.3d 1224, 1229 (2008) (internal quotation marks
omitted).

23 The district court found Bork entered her plea freely, voluntarily, and knowingly
and her claims to the contrary were belied by the record. The plea canvass

1 demonstrates Bork was fully apprised of her rights, she was not coerced or
2 threatened, and she was informed her rights to appeal would be limited by pleading
3 guilty. And, in her written plea agreement, Bork acknowledged her rights to appeal
would be limited by pleaded [sic] guilty and she asserted she was not acting under
duress or coercion.

4 The record supports the district court's findings and demonstrates Bork told the
5 district court she read the information and understood the charge against her. We
6 conclude the district court did not abuse its discretion in this regard. *See Molina v.*
State, 120 Nev. 185, 190, 87 P.3d 533, 537 (2004) (petitioner bears the burden of
proving her plea is invalid).

7 ECF No. 21-11 at 2-3.

8 **1. Ground One, Part One**

9 In Ground One, Part One, Bork asserts that her federal constitutional rights were violated
10 when she was coerced to plead guilty by her trial counsel and the State. ECF No. 17 at 30. Bork
11 elaborates that during a break in her police interview, her trial counsel and the State intimidated
12 and scared her into cooperating and, as a result, later pleading guilty. *Id.* at 31.

13 On September 17, 2012, Bork conducted a proffer in the presence of the Chief Deputy
14 District Attorney, a Deputy District Attorney, Bork's two trial counsel, and several law
15 enforcement officers. ECF No. 20-17 at 98-99. At the time of the interview, Bork was seven
16 months pregnant. *Id.* at 100. After explaining the events of the day that led her to take the victim
17 to the hospital in August 2006, Bork explained that Thompson had admitted that he had hurt the
18 victim but "didn't give [her] any indication as to how he was injured." *Id.* at 117. A short while
19 later, a break was taken in the interview so that Bork could speak with her trial counsel. *Id.* at
20 123. Bork stated that she had not been "completely forthcoming" and had minimized some facts
21 prior to the break in the interview because Thompson had manipulated her and scared her;
22 however, her trial counsel advised her to "be more forthcoming." *Id.* at 128, 160. It was at this
23 point that Bork explained that, approximately a year and a half after the victim sustained his

1 injuries, Thompson had told her that he was “com[ing] down from his drugs” and had shaken the
2 victim out of anger while Bork was asleep. *Id.* at 129, 131, 146. Bork also admitted that she
3 knowingly left the victim “in the care of somebody that [she] knew had been doing some heavy
4 drugs.” *Id.* at 134.

5 Bork alleges that during the break in the proffer interview, her trial counsel and the
6 prosecutors intimated and scared her. ECF No. 17 at 31; *see also* ECF No. 20-17 at 8-9. This
7 argument is belied by the record. Bork’s plea agreement provided that she was “not acting under
8 duress or coercion.” ECF No. 18-8 at 6. And Bork told the state district court during her
9 arraignment that her guilty “plea was freely and voluntarily given” and that no one made “any
10 threats or promises to cause [her] to plead guilty.” ECF No. 18-7 at 7. Moreover, Bork made two
11 separate statements during the proffer that she had minimized information and not been
12 completely forthcoming at the beginning of the interview because of Thompson—not due to any
13 intimidation tactics by her trial counsel or the prosecutors. ECF No. 20-17 at 128, 160. Further,
14 the only information that appears to have changed from the beginning of the interview to the
15 post-break portion of the interview was Bork’s statements about the amount of detail that
16 Thompson gave her surrounding the victim’s death. *See id.* at 117, 129, 131, 146. This fact
17 supports Bork’s interview statement that her trial counsel merely advised her to “be more
18 forthcoming” in the interview, *id.* at 128, not Bork’s current argument that her trial counsel
19 intimidated her. Because there is no evidence that Bork was intimidated into cooperating with
20 law enforcement, the Nevada Supreme Court reasonably concluded that Bork’s plea was entered
21 into freely, voluntarily, and knowingly. *See Brady*, 397 U.S. at 748; *see also Iaea v. Sunn*, 800
22 F.2d 861, 867 (9th Cir. 1986) (“Mere advice or strong urging by third parties to plead guilty
23 based on the strength of the state’s case does not constitute undue coercion.”).

1 Bork is denied federal habeas relief for Ground One, Part One.

2 **2. Ground One, Part Two**

3 In Ground One, Part Two, Bork asserts that her federal constitutional rights were violated
4 because she did not understand the elements of the offense, so her plea was not knowing,
5 intelligent, or voluntary. ECF No. 17 at 32. Bork elaborates that the state district court asked her
6 only if she understood the charge against her, not whether she understood the elements. ECF No.
7 55 at 23.

8 The Supreme Court has held that a guilty plea “would be invalid if [the defendant] had
9 not been aware of the nature of the charges against him, including the elements of the . . . charge
10 to which he pleaded guilty.” *Bradshaw v. Stumpf*, 545 U.S. 175, 182-83 (2005); *see also*
11 *Henderson v. Morgan*, 426 U.S. 637, 645 (1976) (explaining that a “plea could not be voluntary
12 in the sense that it constituted an intelligent admission that [the defendant] committed the offense
13 unless the defendant received ‘real notice of the true nature of the charge against him’” (quoting
14 *Smith v. O’Grady*, 312 U.S. 329, 334 (1941)); *McCarthy v. United States*, 394 U.S. 459, 466
15 (1969) (“[B]ecause a guilty plea is an admission of all the elements of a formal criminal charge,
16 it cannot be truly voluntary unless the defendant possesses an understanding of the law in
17 relation to the facts.”). However, the Supreme Court has “never held that the judge must himself
18 explain the elements of each charge to the defendant on the record.” *Bradshaw*, 545 U.S. at 183.
19 Instead, “the constitutional prerequisite of a valid plea may be satisfied where the record
20 accurately reflects that the nature of the charge and the elements of the crime were explained to
21 the defendant by his own, competent counsel.” *Id.* These constitutional prerequisites were met in
22 this case.

1 During the state district court's canvass at Bork's arraignment, Bork answered in the
2 affirmative when asked if she read the information, which charged her "with a crime of child
3 abuse and neglect with substantial bodily harm," and understood the charges against her. ECF
4 No. 18-7 at 5. Bork later stated that she read the plea agreement and discussed it with her trial
5 counsel. *Id.* at 5-6. Further, Bork's plea agreement provided that she "discussed the elements of
6 all of the original charge(s) . . . with [her] attorney and . . . understand[ed] the nature of the
7 charge(s) against [her]." ECF No. 18-8 at 5. Because the record demonstrates that Bork's trial
8 counsel explained the nature and elements of the charge to Bork and the state district court also
9 discussed the nature of the charge with Bork during the arraignment, the Nevada Court of
10 Appeals reasonably concluded that Bork's plea was entered into freely, voluntarily, and
11 knowingly. *Brady*, 397 U.S. at 748.

12 Bork is denied federal habeas relief for Ground One, Part Two.¹

13 **B. Ground Two²**

14 In Ground Two, Bork alleges that her federal constitutional rights were violated when the
15 State engaged in prosecutorial misconduct. ECF No. 17 at 36. Specifically, Bork alleges that the
16 State coerced her into pleading guilty by telling her during the break in the proffer interview that
17 it would go after her on the murder charge if she did not give the statement that it wanted. *Id.* at
18 36-37. As was explained in Ground One, Part One, the Nevada Court of Appeals held that the
19 district court did not abuse its discretion in finding that Bork's plea was not coerced. ECF No.
20 21-11 at 3. And as was discussed in Ground One, Part One, there was no evidence that Bork was
21

22 ¹ Because Ground One, Part Three is essentially an ineffective assistance of counsel
claim, I will discuss it with Bork's other ineffective assistance of counsel claims.

23 ² I previously dismissed Ground Two, Part Two with prejudice as procedurally defaulted
and abandoned. ECF No. 43 at 6.

1 intimidated into cooperating or pleading guilty. In fact, there is no evidence supporting Bork's
2 contention that the State made threats to her. Therefore, as the Nevada Court of Appeals
3 reasonably held, Bork fails to show coercion on the part of the State demonstrating prosecutorial
4 misconduct. *See generally Berger v. United States*, 295 U.S. 78, 88 (1935) ("It is as much [a
5 prosecutor's] duty to refrain from improper methods calculated to produce a wrongful conviction
6 as it is to use every legitimate means to bring about a just one."). Bork is denied federal habeas
7 corpus relief for Ground Two.

8 **C. Ground Three**

9 In Ground Three, Bork alleges four instances of ineffective assistance of her trial counsel.
10 In *Strickland*, the Supreme Court propounded a two-prong test to analyze claims of ineffective
11 assistance of counsel, requiring the petitioner to demonstrate (1) that the attorney's
12 "representation fell below an objective standard of reasonableness," and (2) that the attorney's
13 deficient performance prejudiced the defendant such that "there is a reasonable probability that,
14 but for counsel's unprofessional errors, the result of the proceeding would have been different."
15 *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). A court considering a claim of
16 ineffective assistance of counsel must apply a "strong presumption that counsel's conduct falls
17 within the wide range of reasonable professional assistance." *Id.* at 689. The petitioner's burden
18 is to show "that counsel made errors so serious that counsel was not functioning as the 'counsel'
19 guaranteed the defendant by the Sixth Amendment." *Id.* at 687. Additionally, to establish
20 prejudice under *Strickland*, it is not enough for the habeas petitioner "to show that the errors had
21 some conceivable effect on the outcome of the proceeding." *Id.* at 693. Rather, the errors must
22 be "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at
23 687. When the ineffective assistance of counsel claim is based on a challenge to a guilty plea, as

1 is the case here, the *Strickland* prejudice prong requires the petitioner to demonstrate “that there
2 is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and
3 would have insisted on going to trial.” *Hill v. Lockhart*, 474 U.S. 52, 59 (1985).

4 Where a state district court previously adjudicated the claim of ineffective assistance of
5 counsel under *Strickland*, establishing that the decision was unreasonable is especially difficult.
6 See *Harrington*, 562 U.S. at 104–05. In *Harrington*, the United States Supreme Court instructed:

7 The standards created by *Strickland* and § 2254(d) are both “highly deferential,”
8 [*Strickland*, 466 U.S. at 689]; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct.
9 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is
10 “doubly” so, *Knowles [v. Mirzayance*, 556 U.S. 111, 123 (2009)]. The *Strickland*
11 standard is a general one, so the range of reasonable applications is substantial. 556
12 U.S., at 123, 129 S.Ct. at 1420. Federal habeas courts must guard against the danger
13 of equating unreasonableness under *Strickland* with unreasonableness under
14 § 2254(d). When § 2254(d) applies, the question is not whether counsel’s actions
15 were reasonable. The question is whether there is any reasonably argument that
16 counsel satisfied *Strickland*’s deferential standard.

13 *Harrington*, 562 U.S. at 105; see also *Cheney v. Washington*, 614 F.3d 987, 995 (9th Cir. 2010)
14 (internal quotation marks omitted) (“When a federal court reviews a state court’s *Strickland*
15 determination under AEDPA, both AEDPA and *Strickland*’s deferential standards apply; hence,
16 the Supreme Court’s description of the standard as doubly deferential.”).

17 **1. Ground Three, Part One**

18 In Ground Three, Part One, Bork alleges that her trial counsel failed to conduct necessary
19 pre-trial litigation. ECF No. 17 at 41. Specifically, Bork alleges that her trial counsel failed to
20 conduct a preliminary hearing before allowing her to plead guilty and failed to move for
21 dismissal of the child abuse charge based on a statute of limitations defense. *Id.* at 41-42.

22 I will first address Bork’s argument that her trial counsel failed to conduct a preliminary
23 hearing. Regarding this assertion, the Nevada Court of Appeals held:

1 Bork claimed counsel was ineffective for denying her right to proceed with the
2 preliminary hearing before agreeing to enter a guilty plea. The district court found
3 Bork voluntarily waived her right to a preliminary hearing; she and counsel were
4 able to negotiate the dismissal of a murder charge by agreeing to plead guilty before
concluding the preliminary hearing; and, given the favorable negotiation, she
cannot show counsel was ineffective or she would have insisted on going to trial.

5 The record demonstrates the district court's factual findings are supported by
6 substantial evidence and are not clearly wrong, and we conclude Bork failed to
demonstrate she was prejudiced by counsel's representation. *See Means v. State*,
7 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004) (petitioner bears the burden of proving
ineffective assistance).

8 ECF No. 21-11 at 5-6.

9 Bork was originally charged with murder and child abuse/neglect resulting in substantial
10 bodily harm. ECF No. 18-6 at 2-3. A preliminary hearing was held on August 31, 2012 for Bork
11 and her co-defendant Thompson regarding those charges. ECF No. 18-5 at 2. Dr. Neha Mehta
12 was the first witness called to testify. *Id.* Dr. Mehta testified that the victim's injuries were
13 caused solely by trauma and that the victim had been physical abused. *Id.* at 11-12. Dr. Timothy
14 Dutra, the medical examiner at the Clark County Office of the Coroner, testified that he
15 conducted an autopsy of the victim. ECF No. 18-5 at 25. Dr. Dutra found the victim's injuries to
16 be "consistent with a severe remote injury; in other words, an injury that happened many years
17 ago." *Id.* Dr. Dutra explained that the victim's "brain itself weighed about a third to a quarter of
18 what it should in a child of that age," that "there had been massive atrophy of the [victim's] brain
19 tissues," and that "the amount of reactive edema of [the victim's] brain" indicated that he
20 suffered blunt force trauma. *Id.* at 27. Dr. Dutra also explained that the victim's cause of death
21 was "nonaccidental head trauma" and that the manner of death was homicide. *Id.* at 27-28.

22 Cortney Campbell, who was a good friend of Bork's and drove Bork and the victim to the
23 hospital on August 21, 2006, testified that she was concerned about the victim's exposure to

1 illegal drug use in the house prior to him sustaining his injuries. ECF No. 18-5 at 36, 40.
2 Campbell testified about her involvement in the events of the evening of the August 21, 2006,
3 and then testified about interactions she had with Bork and Thompson in the following days and
4 years. Campbell explained that approximately two weeks after the victim sustained his injuries,
5 Bork and Thompson got married. *Id.* at 48. Following the marriage ceremony, Campbell heard
6 Bork and Thompson say, “now we cannot testify against each other.” *Id.* Bork later clarified this
7 statement to mean that law enforcement would not “be able to pinpoint a single person [as the
8 perpetrator] and with [Bork and Thompson] being married[,] they wouldn’t have to testify
9 against each other.” *Id.* at 49.

10 Later, in 2007, Campbell asked Bork what happened to the victim. *Id.* at 50. Bork
11 became very emotional and “told [Campbell] that someone that she knew in fact was the person
12 who hurt the baby” by shaking him. *Id.* at 50-51. “At one point [Bork] said she was there [when
13 the shaking occurred]. At another point she said she was not there.” *Id.* at 51. Bork had
14 originally told Campbell that she was at work the morning of August 21, 2006, but in 2007, Bork
15 told Campbell that she was not at work and “[t]hat the injury [to the victim] that she described to
16 [Campbell] took place in the morning when she was” present. *Id.* at 52. Bork also told Campbell
17 that the victim’s behavior the morning of August 21, 2006, made her “aware that [the] victim had
18 a problem at that point” even though he was not taken to the hospital until that evening. *Id.*
19 Finally, Bork told Campbell that there was a discussion between Bork and two other persons on
20 the day of the victim’s injuries about a “cover-up scenario” that entailed Bork and the other two
21 persons sticking together so that the police “would not be able to pinpoint who was involved.”
22 *Id.* at 53.

1 Lisa Peele, a former Las Vegas Metropolitan Police Department Officer, testified at the
2 preliminary hearing that she interviewed Bork in the hospital on August 22, 2006. ECF No. 18-5
3 at 67. Among other things, Bork told Officer Peele that she waited an hour to take the victim to
4 the hospital after noticing that his tongue was sticking to the roof of his mouth. *Id.* at 70.
5 Following the conclusion of Officer Peele's testimony, the preliminary hearing was continued to
6 another day for the presentation of two additional witnesses. *See id.* at 74. However, before the
7 continued hearing could take place, Bork conducted a proffer with the State on September 17,
8 2012, and pleaded guilty on September 26, 2012. ECF No. 20-17 at 98-99; ECF No. 18-7 at 7.
9 Thereafter, on October 5, 2012, the preliminary hearing continued against Thompson, and Bork
10 testified as a witness for the State. ECF No. 19 at 2.

11 Bork contends that if she had not been ineffectively advised to plead guilty before the
12 remainder of the preliminary hearing could be conducted, there was little chance that the state
13 justice court would have bound over her murder or child abuse charges to the state district court.
14 ECF No. 17 at 43. This argument lacks merit. “[T]o establish probable cause to bind a
15 defendant over for trial, the state must show that (1) a crime has been committed [known as the
16 corpus delicti] and (2) there is probable cause to believe the defendant committed it.” *Sheriff v.*
17 *Middleton*, 112 Nev. 956, 961, 921 P.2d 282, 285 (1996). During “the preliminary hearing stage,
18 probable cause to bind a defendant over for trial ‘may be based on “slight,” even “marginal”
19 evidence because it does not involve a determination of guilt or innocence of an accused.’” *Id.*,
20 921 P.2d at 286. “[T]he state’s burden with respect to the corpus delicti is the same as its burden
21 to show probable cause[: t]he state must present evidence supporting a ‘reasonable inference’ of
22 death by criminal agency.” *Id.* at 962, 921 P.2d at 286.

23

1 Dr. Mehta testified that the victim's injuries on August 21, 2006, were consistent with
2 physical abuse, and Dr. Dutra testified that the victim died in 2011 from his earlier, severe
3 injuries and that the manner of his death was homicide. ECF No. 18-5 at 11-12, 25, 27-28.
4 Campbell then testified that Bork allowed the victim to be exposed to illegal drug use; Bork and
5 Thompson talked about being unable to testify against one another due to their marriage
6 approximately two weeks after the victim's injuries were sustained; Bork knew that the victim
7 was injured due to having been shaken; Bork was present with the injuries occurred; Bork did
8 not take the victim to the hospital until the evening of August 21, 2006, even though she was
9 aware that he was having issues earlier in the day; and Bork and her accomplices conspired to
10 "cover-up" the crime. *Id.* at 40, 48, 50-53. This evidence is sufficient to show that there was
11 probable cause that the victim had been abused and murdered and that Bork either committed the
12 crimes, conspired with another to commit the crimes, or aided and abetted another to commit the
13 crimes. *Middleton*, 112 Nev. at 961-62, 921 P.2d at 285-86.

14 Moreover, because Bork pleaded guilty to child abuse/neglect resulting in substantial
15 bodily harm, her murder charge was dismissed. ECF No. 18-7 at 3-4, 8; ECF No. 18-8. Even if
16 the preliminary hearing testimony was not yet complete at the time Bork pleaded guilty, the
17 testimony that was presented was damaging for Bork and was sufficient for Bork's trial counsel
18 to assess Bork's risk of being convicted of murder if she went to trial. Cf. *Premo v. Moore*, 562
19 U.S. 115, 124 (2011) ("In the case of an early plea, neither the prosecution nor the defense may
20 know with much certainty what course the case may take. It follows that each side, of necessity,
21 risks consequences that may arise from contingencies or circumstances yet unperceived. The
22 absence of a developed or an extensive record and the circumstances that neither the prosecution
23 nor the defense case has been well defined create a particular risk that an after-the-fact

1 assessment will run counter to the deference that must be accorded counsel's judgment and
2 perspective when the plea was negotiated, offered, and entered."). Because there was probable
3 cause to bind Bork over for trial and sufficient evidence for Bork's trial counsel to weigh the
4 risks of going to trial versus seeking a plea deal, the Nevada Court of Appeals reasonably
5 concluded that Bork failed to demonstrate deficiency or prejudice regarding her trial counsel
6 advice to seek a plea deal before the conclusion of the preliminary hearing. *Strickland*, 466 U.S.
7 at 688, 694; *see also Premo*, 562 U.S. at 124 ("The opportunities [of an early plea] include
8 pleading to a lesser charge and obtaining a lesser sentence, as compared with what might be the
9 outcome not only at trial but also from a later plea if the case grows stronger and prosecutors find
10 stiffened resolve.").

11 Turning to Bork's second argument—that her trial counsel failed to move for dismissal of
12 the child abuse charges based on the statute of limitations—the Nevada Court of Appeals held:

13 Bork claimed counsel was ineffective for failing to move to dismiss the child-
14 abuse-and-neglect charge based on the statute of limitations. The district court
15 found Bork could not show counsel acted unreasonably or she was prejudiced
16 because the statutes of limitation provide an affirmative defense, the information
alleged she lied to medical professionals about the nature of the victim's injuries,
and the State would have been able to present evidence she committed the offense
in a secretive manner that tolled the statute of limitations.

17 ECF No. 21-11 at 5.

18 Nev. Rev. Stat. § 171.085 provides that "an indictment for . . . [a]ny felony other than the
19 felonies listed [previously] must be found, or an information or complaint filed, within 3 years
20 after the commission of the offense." However, Nev. Rev. Stat. § 171.095(1)(a) provides that
21 "[i]f a felony . . . is committed in a secret manner, an indictment for the offense must be found,
22 or an information or complaint filed, within the periods of limitation prescribed in NRS
23 171.085 . . . after the discovery of the offense."

1 The victim's injuries were sustained "on or about" August 20, 2006, and the criminal
2 complaint was filed against Bork on July 28, 2012. ECF No. 18-4 at 2. Although the criminal
3 information was not filed "within 3 years after the commission of the offense," Nev. Rev. Stat.
4 § 171.085, the Nevada Court of Appeals reasonably concluded that the State would have been
5 able to present evidence that Bork committed the offense in a secret manner, thereby tolling the
6 statute of limitations. *See Dozier v. State*, 124 Nev. 125, 128, 178 P.3d 149, 152 (2008) ("NRS
7 171.095 provides for the tolling of the statute of limitations when certain felonies . . . are
8 committed in such a way that prevents or delays discovery."); *see also Walstrom v. State*, 104
9 Nev. 51, 56, 752 P.2d 225, 228 (1988) ("We conclude that a crime is done in a secret manner,
10 under NRS 171.095, when it is committed in a deliberately surreptitious manner that is intended
11 to and does keep all but those committing the crime unaware that an offense has been
12 committed."), *overruled on other grounds by Hubbard v. State*, 112 Nev. 946, 948, 902 P.2d
13 991, 992 (1996). Indeed, Campbell provided testimony at the preliminary hearing that Bork and
14 Thompson got married shortly after the offense to avoid having to testify against each other; that
15 even though Bork knew how the victim's injuries occurred, she did not tell law enforcement or
16 any medical staff; and that Bork conspired to "cover-up" the victim's injuries. ECF No. 18-5 at
17 48-53. Because the statute of limitations was tolled, it would have been fruitless for Bork's trial
18 counsel to have moved for the dismissal of the child abuse charges based on Nev. Rev. Stat.
19 § 171.085. Accordingly, the Nevada Court of Appeals reasonably concluded that Bork failed to
20 demonstrate that her trial counsel acted deficiently or that she was prejudiced. *Strickland*, 466
21 U.S. at 688, 694.

22 Bork is denied federal habeas relief for Ground Three, Part One.

23 ////

1 **2. Ground Three, Part Two**

2 In Ground Three, Part Two, Bork alleges that her federal constitutional rights were
3 violated when her trial counsel failed to properly investigate her case. ECF No. 17 at 44.
4 Specifically, Bork argues that her counsel should have investigated the medical evidence in order
5 to corroborate her explanation that she took the victim to the hospital as soon as she noticed he
6 was having problems. *Id.* at 46. Bork also alleges that her trial counsel should have investigated
7 whether she could have told the doctors anything further that would have affected the victim's
8 treatment. *Id.* In Bork's appeal of the denial of her state habeas petition, the Nevada Court of
9 Appeals held:

10 Bork claimed counsel was ineffective for failing to adequately review and
11 investigate her case prior to the entry of the plea. She specifically claimed counsel
12 should have consulted with medical experts to determine whether an earlier medical
intervention would have changed the outcome. The district court found Bork failed
to establish that any information obtained through such a consultation would have
been helpful to her case or would have caused her to insist on going to trial.
13

14 ECF No. 21-11 at 4.

15 Bork alleges this further investigation that should have been conducted by her trial
16 counsel would have rebutted the State's contention that Bork "failed to obtain medical treatment
17 or care to save [the victim's] life until irreversible brain damage had been done, thereafter lying
18 to medical and law enforcement personnel about the nature and time of occurrence of [the
19 victim's] injury." ECF No. 18-4 at 3. However, as the Nevada Court of Appeals reasonably
20 concluded, Bork fails to demonstrate that this further investigation would have caused her to
21 have insisted on going to trial. *Hill*, 474 U.S. at 59. In fact, information relating to these
22 investigation questions was elicited during the preliminary hearing, and Bork still chose to plead
23 guilty thereafter. See ECF No. 18-5 at 14 (during cross-examination, Bork's trial counsel

1 questioned Dr. Mehta about the timing of the victim's injuries, and Dr. Mehta answered in the
2 affirmative when asked if "the swelling of the brain appeared to be fairly contemporaneous to the
3 injuring event"); at 16 (during cross-examination by Thompson's trial counsel, Dr. Mehta was
4 asked about the knowledge of the basis of the victim's injuries, in which she testified that "[a]s
5 soon as the child presented to the emergency department, immediately at triage the nurse realized
6 something was wrong, the physician realized something was wrong"). Thus, Bork is denied
7 federal habeas corpus relief for Ground Three, Part Two.

8 **3. Ground Three, Part Three**

9 In Ground Three, Part Three, Bork alleges that her federal constitutional rights were
10 violated when her trial counsel coerced her into pleading guilty. ECF No. 17 at 47. As explained
11 in Ground One, Part One, the Nevada Court of Appeals held that the district court did not abuse
12 its discretion in finding that Bork's plea was not coerced. ECF No. 21-11 at 3. In the same order,
13 the Nevada Court of Appeals held, generally, that "[t]he record demonstrate the district court's
14 factual findings are supported by substantial evidence and are not clearly wrong, and we
15 conclude Bork failed to demonstrate she was prejudiced by counsel's representation. *See Means*
16 *v. State*, 120 Nev. 1001, 1012, 103 P.3d 25, 33 (2004)." *Id.* at 5-6. As discussed in Ground One,
17 Part One, there was no evidence that Bork was intimidated into cooperating with law
18 enforcement by her trial counsel. Therefore, as the Nevada Court of Appeals reasonably held,
19 Bork fails to demonstrate that her trial counsel were deficient or that she was prejudiced.
20 *Strickland*, 466 U.S. at 688, 694. Bork is denied federal habeas corpus relief for Ground Three,
21 Part Three.

1 **4. Ground One, Part Three³**

2 In Ground One, Part Three, Bork asserts that the ineffective assistance of her trial counsel
3 made her plea unconstitutional.⁴ ECF No. 17 at 34. Bork elaborates that her trial counsel failed to
4 realize and advise her that her statement did not amount to the crime charged and that the crime
5 was well beyond the statute of limitations. ECF No. 55 at 19, 21.

6 Bork previously conceded that this ground was unexhausted. ECF No. 17 at 36.
7 However, in her response to the respondents' motion to dismiss, she contended that this ground
8 is technically exhausted but procedural defaulted because it would be procedurally barred in the
9 state courts, and "she cannot overcome the default in state court." ECF No. 37 at 3. Bork also
10 contended that she can demonstrate cause and prejudice because she had no post-conviction
11 counsel. *Id.* I previously deferred consideration of whether Bork can demonstrate cause and
12 prejudice, under *Martinez v. Ryan*, 566 U.S. 1 (2012), to overcome the procedural default. ECF
13 No. 43 at 6.

14 In *Martinez*, the Supreme Court ruled that "when a State requires a prisoner to raise an
15 ineffective-assistance-of-trial counsel claim in a collateral proceeding, a prisoner may establish
16 cause for a default of an ineffective-assistance claim" if "the state courts did not appoint counsel
17 in the initial-review collateral proceeding" or "where appointed counsel in the initial-review
18 collateral proceeding . . . was ineffective." 566 U.S. at 14. "To overcome the default, a prisoner
19 must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a

20
21

22 ³ Because Ground One, Part Three is essentially an ineffective assistance of counsel
claim, I discuss it here.

23 ⁴ I previously dismissed the following portion of Ground One, Part Three with prejudice
as procedurally defaulted: allegations that Bork's plea was not voluntary, knowing, and
intelligent due to alleged prosecutorial misconduct. ECF No. 43 at 6.

1 substantial one, which is to say that the prisoner must demonstrate that the claim has some
2 merit.” *Id.*

3 Although Bork’s testimony at the proffer interview, Thompson’s preliminary hearing,
4 and Thompson’s trial may not have established that she committed a crime, Bork acknowledged
5 additional, incriminating facts at her arraignment:

6 [B]eyond having knowledge of leaving the child in the care of somebody that was
7 under the influence of methamphetamine, specifically, and knowing that that once
8 she became aware and did not seek medical attention that thereafter she did learn
9 of what had taken place with the child and failed to provide that information to the
10 police. That specifically that Edward Thompson had confessed to her that he had
shaken the child . . . to such a degree that the child stopped crying and then suffered
irreversible injury thereafter. That she failed to go to the police and talk to the
police about that or tell the medical providers any of that information, and also
worked with him to cover up this crime thereafter.

11 ECF No. 18-7 at 8-9. Because Bork’s trial counsel had knowledge of these facts following
12 Campbell’s testimony at Bork’s preliminary hearing and because these facts demonstrate that
13 Bork did commit a crime, it cannot be concluded that her trial counsel was deficient for allegedly
14 not advising her that her non-self-incriminating testimony presented against Thompson did not
15 amount to a crime. *Strickland*, 466 U.S. at 688. Further, I have already determined that the facts
16 of Bork’s crime would have tolled the statute of limitations, such that Bork’s trial counsel was
17 not ineffective for not advising Bork about this possible defense or moving to dismiss the charge
18 on this basis. *Id.* Because these ineffective-assistance-of-trial-counsel arguments fail, Ground
19 One, Part Three is not substantial. Therefore, Ground One, Part Three is denied as being
20 procedurally defaulted. *See Martinez*, 566 U.S. at 14.

21 **D. Ground Four and Ground Three, Part Four**

22 In Ground Four, Bork asserts that her federal constitutional rights were violated when the
23 state district court allowed a non-victim to speak in the voice of the deceased child about

1 impalpable, inadmissible evidence at Bork's sentencing. In her appeal of her judgment of
2 conviction, the Nevada Supreme Court held:

3 [A]ppellant Monique Karien Bork contends that the district court committed plain
4 error at sentencing by allowing improper victim impact testimony. *See* NRS
5 176.015(3). Bork claims that the district court erred "by allowing a non-victim to
6 speak in the first person voice of the deceased child." Notably, Bork did not object
7 at the time of sentencing. Although we agree that the district court erred by
8 allowing the witness in question to testify, we conclude that Bork fails to
demonstrate prejudice affecting her substantial rights. *See Gallego v. State*, 117
Nev. 348, 365, 23 P.3d 227, 239 (2001). [Footnote 1: Bork also notes that she was
not provided with notice that the witness would testify. Bork is not entitled to relief
on this basis. *See* NRS 176.015(4) ("Any defect in notice . . . [is] not grounds for
appeal.").]

9 "[J]udges spend much of their professional lives separating the wheat from the
10 chaff and have extensive experience in sentencing, along with the legal training
11 necessary to determine an appropriate sentence." *Randell v. State*, 109 Nev. 5, 7-
12 8, 846 P.2d 278, 280 (1993) (quoting *People v. Mockel*, 276 Cal. Rptr. 559, 563
13 (Ct. App. 1990)). Here, the brief statement by the challenged witness merely
14 thanked the victim's grandmother and adoptive parents for the care they provided,
15 did not specifically address the defendant or the crime, and did not make a
16 sentencing recommendation. The district court also heard from the victim's
17 adoptive parents, *see* NRS 176.015(3), (5)(d)(3), who both asked the district court
18 to impose the maximum sentence after providing details about the victim's life after
19 his severe brain injury and his extensive medical history preceding his death. The
20 State, as well, argued for the maximum sentence and the district court imposed the
21 maximum prison term of 96-240 months. [Footnote 2: The Division of Parole and
22 Probation recommended a prison term of 53-240 months.] Bork fails to
23 demonstrate that the challenged statement unduly influenced the district court, and
we conclude that the district court did not commit plain error entitling her to a new
sentencing hearing. *See Dieudonne v. State*, 127 Nev. ___, ___, 245 P.3d 1202,
1204-05 (2011) (reviewing the failure to object to victim impact statements for
plain error). [Footnote 3: Additionally, according to documents provided by Bork
on appeal, at the hearing on her motion for resentencing, the district court, who also
presided over the codefendant's trial, stated that in sentencing Bork, it considered
"everything that was presented to me in the course of this case," and that "[a]s far
as that one speaker, quite frankly it would have been pretty nominal, the impact,
given the breadth of information that was provided to me before sentencing."].

ECF No. 20-14 at 2-3. This ruling was reasonable.

At Bork's sentencing hearing, Andrea Legro, an unidentified person, read the following

letter:

1 I had always looked forward to the day when I would be old enough to tell you
2 what was in my heart. I thought I lost that chance, but today is my day.
3

4 I was so little at birth and required lots of extra attention. Thank you for taking me
5 to the doctor when I knew you had other things to do. I never meant to cause you
6 any trouble. My injuries were so severe that I couldn't help but cry, sometimes the
7 whole night long. It hurt so bad. I never meant to exhaust you. No matter what
8 you did I was inconsolable. I'm very sorry about that. But I looked forward to the
9 day I could play with my brothers and sisters, but I won't ever get the chance to do
10 that now. I will always remember them, but could you please make sure that they
11 remember me?

12 When my world was dark and scary, you held me. You kept me safe and warm and
13 showed me unconditional love. You made my little life worth living. So thank you
14 grandma Ursula, mommie Tish, and mommie Gayle for loving me just the way I
15 was. Hugs and Kisses, love you always, Brayden.

16 ECF No. 20-1 at 5-6. Later, at the hearing on Bork's motion for resentencing, Bork's trial
17 counsel explained that he "did not object" to Legro's testimony because "[t]he notice had been
18 given to [him] about a year before and the speakers were fairly quick as far as what she said and
19 [he] didn't catch that until after she had . . . finished." ECF No. 20-6 at 4. At that same hearing,
20 the state district court indicated that "[a]s far as that one speaker, [Legro,] quite frankly it would
21 have been pretty nominal, the impact, given the breadth of information that was provided to me
22 before sentencing." *Id.*

23 "Victim impact evidence is simply [a] form or method of informing the sentencing
24 authority about the specific harm caused by the crime in question, evidence of a general type
25 long considered by sentencing authorities." *Payne v. Tennessee*, 501 U.S. 808, 825 (1991). Bork
26 asserts that Legro's testimony was inappropriate because it is not apparent that she was a victim
27 and her letter written from the point of view of the victim was inappropriate. Nevada law affords
28 a "victim an opportunity to . . . [r]easonably express any views concerning the crime, the person
29 responsible, the impact of the crime on the victim and the need for restitution." Nev. Rev. Stat.

1 § 176.015(3)(b). However, a victim is limited to a person or a relative of a person “against
2 whom a crime has been committed” or “who has been injured or killed as direct result of the
3 commission of a crime.” Nev. Rev. Stat. § 176.015(5)(d). It is not apparent that Legro fits within
4 the definition of a victim, so the Nevada Supreme Court reasonably concluded that the state
5 district court erred by allowing her testimony. However, the Nevada Supreme Court also
6 reasonably concluded that relief was not warranted. Legro’s statement was relatively brief and
7 did not address Bork or the crime. *See* ECF No. 20-1 at 6. And importantly, the state district
8 court indicated that the impact of Legro’s statement was “pretty nominal.” ECF No. 20-6 at 4.
9 Accordingly, as the Nevada Supreme Court reasonably determined, Bork fails to demonstrate
10 that the state district court was unduly influenced by the improper testimony. *See Rhoades v.*
11 *Henry*, 638 F.3d 1027, 1055 (9th Cir. 2011) (“We assume that the trial judge applied the law . . .
12 and considered only evidence that he knew was admissible.”); *Smith v. Stewart*, 140 F.3d 1263,
13 1272 (9th Cir. 1998) (explaining that judges “can separate the wheat from the chaff”). Bork is
14 denied federal habeas relief for Ground Four.

15 Turning to Ground Three, Part Four, Bork asserts that her federal constitutional rights
16 were violated when her trial counsel failed to object to Legro’s victim impact testimony at her
17 sentencing hearing. ECF No. 17 at 48. In Bork’s appeal of the denial of her state habeas petition,
18 the Nevada Court of Appeals held:

19 Bork claimed counsel was ineffective for failing to object at sentencing to a non-
20 victim impact statement when the speaker was “looking directly at petitioner,
21 putting on a theatrical performance, [and] verbally abusing petitioner.” The district
22 court found Bork failed to identify any legal basis for an objection, the Nevada
23 Supreme Court determined the error in admitting the non-victim speaker’s
testimony did not result in prejudice, and Bork cannot establish prejudice.

23 ECF No. 21-11 at 4. This ruling was reasonable.

Even if Bork’s trial counsel was deficient—he appears to admit his deficiency at the hearing on the motion for resentencing, *see* ECF No. 20-6 at 4—Bork cannot establish prejudice. *Strickland*, 466 U.S. at 694. The trial judge explained that it presided over the “companion trial” of Thompson and “had the opportunity to hear from all the witnesses that were involved in this case.” ECF No. 20-6 at 4. The judge then explained that “everything that was presented to [it] in the course of this case was considered.” *Id.* Thus, even if Bork’s trial counsel had objected to Legro’s testimony, which was very brief, Bork fails to demonstrate that the result of her sentencing would have been different due to the vast amount of other information that was considered by the state district court in regards to Bork’s sentence. *Strickland*, 466 U.S. at 694; *see also Djerf v. Ryan*, 931 F.3d 870, 881 (9th Cir. 2019) (“Strickland prejudice is not established by mere speculation.”). Bork is denied federal habeas relief for Ground Three, Part Four.

E. Ground Five

In Ground Five, Bork argues that her sentence was cruel and unusual in violation of the federal constitutional because she lacked culpability and provided extensive testimony against Thompson. ECF No. 17 at 51-52. In her appeal of her judgment of conviction, the Nevada Supreme Court held:

Bork contends that the district court abused its discretion by imposing an excessive and disproportionate sentence constituting cruel and unusual punishment. We disagree. This court will not disturb a district court’s sentencing determination absent an abuse of discretion. *Parrish v. State*, 116 Nev. 982, 989, 12 P.3d 953, 957 (2000). Bork fails to demonstrate that the district court relied solely on impalpable or highly suspect evidence or allege that the sentencing statutes are unconstitutional. *See Chavez v. State*, 125 Nev. 328, 347-48, 213 P.3d 476, 489-90 (2009). Bork’s prison term of 96-240 months falls within the parameters provided by the relevant statute, *see* NRS 200.508(1)(a)(2), and the sentence imposed is not so unreasonably disproportionate to the gravity of the offense as to shock the conscience, *see Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 221-22 (1979);

1 see also *Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion).
2 We conclude that the district court did not abuse its discretion at sentencing.

3 ECF No. 20-14 at 3-4.

4 The Eighth Amendment provides that “cruel and unusual punishments [shall not be]
5 inflicted.” U.S. Const. amend. VIII. “[B]arbaric punishments” and “sentences that are
6 disproportionate to the crime” are cruel and unusual punishments. *Solem v. Helm*, 463 U.S. 277,
7 284 (1983) (concluding that a habitual offender’s sentence for a seventh nonviolent felony for
8 life without the possibility of parole is disproportionate). The Eighth Amendment does not,
9 however, mandate strict proportionality between the defendant’s sentence and the crime. See
10 *Ewing v. California*, 538 U.S. 11, 23 (2003). Rather, “only extreme sentences that are ‘grossly
11 disproportionate’ to the crime” are forbidden. *Harmelin v. Michigan*, 501 U.S. 957, 1001 (1991).
12 “In assessing the compliance of a non-capital sentence with the proportionality principle, [the
13 Court] consider[s] ‘objective factors’” such as “the severity of the penalty imposed and the
14 gravity of the offense.” *Taylor v. Lewis*, 460 F.3d 1093, 1098 (9th Cir. 2006). “[S]uccessful
15 challenges based on proportionality are ‘exceedingly rare,’ and deference is due legislative
16 judgments on such matters.” *Id.* (citing *Solem*, 463 U.S. at 289-90).

17 The state district court sentenced Bork to 8 to 20 years without explanation. ECF No. 20-
18 2 at 9. Bork later moved for resentencing, see ECF No. 20-4, and during a hearing on that
19 motion, the sentencing judge elaborated on the factors it considered in sentencing Bork:

20 In this particular case I have a lot more - - I had a lot more information than I have
21 in most cases when I sentence someone. Obviously, I had the sentencing
22 memorandum that was provided by the defense and I had the speakers that came at
23 the time of sentencing. So as to the speakers at the time of sentencing, that was
basically the second time I had heard from those speakers.

24 As you’re well aware there was a companion trial that preceded Ms. Bork’s
25 sentencing and I had already heard from those speakers at length during the course
of the trial. Additionally, I had the opportunity to hear from all the witnesses that

1 were involved in the case. Additionally, I had the chance to listen to Ms. Bork
2 speak on examination and cross examination for over two days during the course
3 of the trial. So, everything that was presented to me in the course of this case was
4 considered by me.

5 ECF No. 20-6 at 4.

6 Bork was adjudged guilty under Nevada Revised Statutes § 200.508, which provided a
7 sentence of 2 to 20 years for the crime of abuse, neglect, or endangerment of a child resulting in
8 substantial bodily harm. Bork's sentence of 8 to 20 years was, therefore, the harshest
9 punishment allowed by that statute. *See Nev. Rev. Stat. § 193.130(1)* ("The minimum term of
10 imprisonment that may be imposed must not exceed 40 percent of the maximum term
11 imposed."). However, it cannot be concluded that Bork's sentence was "'grossly
12 disproportionate' to the crime." *Harmelin*, 501 U.S. at 1001.

13 It is noted that Bork's psychiatric evaluation, performed by Norton A. Roitman, MD,
14 DFAPA, was favorable. *See ECF No. 19-4 at 11-19*. In fact, Dr. Roitman reported that Bork was
15 "caught up in [a] cycle of victimization, abuse, neglect, shame, and misshapen priorities," but
16 she "is willing to do anything to improve." *Id.* at 19. Dr. Roitman concluded that Bork "has no
17 mental illness that predicts further neglect or abuse, and there is no reason to be concerned about
18 any dangerousness to her children or anyone." *Id.* at 19. However, this evaluation must be
19 considered in combination with the facts of the case.

20 At her arraignment, Bork acknowledged that she left her son, the victim, "in the care of
21 somebody that was under the influence of methamphetamine," that she did not seek immediate
22 medical attention after learning that the victim had been injured, that she failed to inform law
23 enforcement or medical personnel that Thompson confessed to her that he had shaken the victim,
abuse, the victim was left "legally blind, with an extremely poor prognosis for survival and

1 development, to include ‘no hope for any higher functions.’” ECF No. 23 at 7. The victim also
2 “suffered from numerous medical problems to include Cerebral Palsy and received nutrition
3 through a Gastrostomy Tube” throughout the remainder of his life before he died as a result of
4 his injuries on July 10, 2012. *Id.* These facts demonstrate that the gravity of Bork’s offense was
5 severe: Bork did not protect her son and failed to get him immediate medical treatment, and as a
6 result, her son suffered life-altering and life-ending injuries. Because the gravity of Bork’s
7 offense was severe, her sentence does not violate the Eight Amendment. *Taylor*, 460 F.3d at
8 1098; cf. *Ramirez v. Castro*, 365 F.3d 755, 756-57 (9th Cir. 2004) (finding a sentence of 25 years
9 to life was grossly disproportionate to three shoplifting offenses). It is also worth noting that
10 Bork is eligible for parole after serving eight years. See *Rummel v. Estelle*, 445 U.S. 263, (1980)
11 (“[B]ecause parole is ‘an established variation on imprisonment of convicted criminals,’ . . . a
12 proper assessment of [a state’s] treatment of [a habeas petitioner] could hardly ignore the
13 possibility that he will not actually be imprisoned for the rest of his life.”).

14 Bork is denied federal habeas relief for Ground Five.

15 **F. Ground Six**

16 In Ground Six, Bork argues that her federal constitutional rights were violated when the
17 state district court judge used publicity about her case for campaign purposes. ECF No. 17 at 56.
18 Specifically, Bork explains that the judge posted a link on her Facebook page to an article
19 highlighting Bork’s sentence while the judge was seeking reelection to the bench. *Id.* In Bork’s
20 appeal of her judgment of conviction, the Nevada Supreme Court held:

21 Bork contends that the district court violated her right to due process and a fair
22 tribunal by using “publicity about this case for campaign purposes.” Bork takes
23 issues with the district court judge posting a link of her Facebook page to an article
about the sentencing hearing after the sentence was imposed. Bork claims that the
district court abused its discretion by denying her motion for resentencing and that

1 she is entitled to a new sentencing hearing before a different district court judge.
2 We disagree.

3 Initially, we note that no statute or court rule provides for an appeal from an order
4 denying a motion for resentencing, and a challenge to the denial of the motion is
5 not properly raised in this direct appeal. *See Castillo v. State*, 106 Nev. 349, 352,
6 792 P.2d 1133, 1135 (1990) (explaining that the right to appeal is statutory; where
7 no statute or court rule provides for an appeal, no right to appeal exists). Bork never
8 moved to disqualify the district court judge, *see Towbin Dodge, LLC v. Eighth*
9 *Judicial Dist. Court*, 121 Nev. 251, 260, 112 P.3d 1063, 1069 (2005) (“[I]f new
10 grounds for a judge’s disqualification are discovered after the time limits in NRS
11 1.235(1) have passed, then a party may file a motion to disqualify based on [NCJC
12 Canon 2, Rule 2.11].”), and a challenge to the district court’s impartiality is not
13 properly raised in this appeal. Additionally, we are not persuaded that the posting
14 of a link to an article about Bork’s sentencing hearing on the district court judge’s
15 Facebook page, after the sentence was imposed, indicates bias or impropriety. *See*
16 *Sonner v. State*, 112 Nev. 1328, 1335, 930 P.2d 707, 712 (1996) (holding that a
17 bare allegation of bias is insufficient to rebut the presumption of impartiality).

18 ECF No. 20-14 at 4-5. This ruling was not unreasonable.

19 “A fair trial in a fair tribunal is a basic requirement of due process.” *In re Murchison*, 349
20 U.S. 133, 136 (1955). And fairness “requires an absence of actual bias in the trial of cases,”
21 however, it is “endeavored to prevent even the probability of unfairness.” *Id.*; *see also Greenway*
22 *v. Schriro*, 653 F.3d 790, 806 (9th Cir. 2011) (“A showing of judicial bias requires facts
23 sufficient to create actual impropriety or an appearance of impropriety.”). This “most basic tenet
of our judicial system helps to ensure both the litigants’ and the public’s confidence that each
case has been adjudicated by a neutral and detached arbiter.” *Hurles v. Ryan*, 752 F.3d 768, 788
(9th Cir. 2014).

24 “[T]he floor established by the Due Process Clause clearly requires a . . . judge with no
25 actual bias against the defendant or interest in the outcome of his particular case.” *Bracy v.*
26 *Gramley*, 520 U.S. 899, 904-05 (1997); *see also Tumey v. Ohio*, 273 U.S. 510, 523 (1927)
27 (explaining that a defendant is denied due process if the judge “has a direct, personal, substantial

1 pecuniary interest in reaching a conclusion against him in his case”). And recusal is warranted
2 when “the probability of actual bias on the part of the judge or decisionmaker is too high to be
3 constitutionally tolerable.” *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Indeed, “[e]very
4 procedure which would offer a possible temptation to the average man as a judge to forget the
5 burden of proof required to convict the defendant, or which might lead him not to hold the
6 balance nice, clear, and true between the state and the accused denies the latter due process of
7 law.” *Tumey*, 273 U.S. at 532. Therefore, “when a defendant’s right to have his case tried by an
8 impartial judge is compromised, there is structural error that requires automatic reversal.”
9 *Greenway*, 653 F.3d at 805.

10 In Bork’s motion for resentencing, she argued that “it would be most appropriate for the
11 matter to be transferred for resentencing as a posting to Facebook highlighting an imposition of a
12 maximum sentence could be construed as a possible impropriety under the Judicial Canon rules.”
13 ECF No. 20-4 at 5. Bork asserted that in order “[t]o avoid any appearance of impropriety based
14 upon the link being posted,” the case should be reassigned to a new state district court judge for
15 sentencing. *Id.* However, at the hearing on Bork’s motion for resentencing, her trial counsel
16 indicated, “there are not any allegations that were intentional to indicate that there was any
17 misconduct or any concerns about the Court’s actions in reference to this.” ECF No. 20-6 at 3.

18 Although it is unclear what the article itself discussed, it cannot be concluded that the
19 state district court judge posting a link to the article to her Facebook page demonstrates “the
20 probability of actual bias.” *Withrow*, 421 U.S. at 47. In fact, the posting did not occur until after
21 Bork’s sentencing concluded, and there is no evidence that the state district court judge
22 sentenced Bork to a longer sentence simply to be able to later boast about her ruling by posting
23 about it on her Facebook page in an attempt to fuel her reelection campaign. Thus, because the

1 Nevada Supreme Court reasonably concluded that the district court judge's actions did not
2 indicate bias or impropriety, Bork is denied federal habeas relief for Ground Six.

3 **G. Ground Seven**

4 In Ground Seven, Bork argues that the cumulative effect of errors violated her federal
5 constitutional rights. ECF No. 17 at 57. In her appeal of the denial of her state habeas petition,
6 the Nevada Court of Appeals held: "even assuming errors may be cumulated to find unlawful
7 imprisonment, Bork failed to demonstrate any error, so there was nothing to cumulate." ECF No.
8 21-11 at 6-7. This ruling was reasonable as Bork has failed to demonstrate any errors. Bork is
9 denied federal habeas corpus relief for Ground Seven.⁵

10 **IV. CERTIFICATE OF APPEALABILITY**

11 This is a final order adverse to Bork. Rule 11 of the Rules Governing Section 2254 Cases
12 requires me to issue or deny a certificate of appealability (COA). Therefore, I have *sua sponte*
13 evaluated the claims within the petition for suitability for the issuance of a COA. *See* 28 U.S.C. §
14 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002). A COA may issue only
15 when the petitioner "has made a substantial showing of the denial of a constitutional right." 28
16 U.S.C. § 2253(c)(2). With respect to claims rejected on the merits, a petitioner "must
17 demonstrate that reasonable jurists would find the district court's assessment of the constitutional
18 claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v.*
19 *Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if

20 ⁵ Bork requested that I conduct an evidentiary hearing "at which proof may be offered
21 concerning the allegations in th[e] amended petition." ECF No. 17 at 58. Bork fails to explain
22 what evidence would be presented at an evidentiary hearing. Additionally, I have already
23 determined that Bork is not entitled to relief, and neither further factual development nor any
evidence that may be proffered at an evidentiary hearing would affect my reasons for denying
her remaining ground for relief. Accordingly, I deny Bork's request for an evidentiary hearing.

1 reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a
2 constitutional right and (2) whether the court's procedural ruling was correct. *Id.* Applying these
3 standards, I find that a certificate of appealability is unwarranted.

4 **V. CONCLUSION**

5 I THEREFORE ORDER that the Amended Petition for Writ of Habeas Corpus Pursuant
6 to 28 U.S.C. § 2254(d) (**ECF No. 17**) is **DENIED**.

7 I FURTHER ORDER that Bork is denied a certificate of appealability.

8 I FURTHER ORDER, under Federal Rule of Civil Procedure 25(d), the Clerk of Court to
9 substitute Dwight Neven for Jo Gentry as the Respondent warden on the docket for this case.

10 I FURTHER ORDER the Clerk of the Court to enter judgment accordingly.

11 Dated: February 27, 2020.
12 
13 ANDREW P. GORDON
UNITED STATES DISTRICT JUDGE

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